77-317

Supreme Court, U. S.
FILED
AUG 27 1977
MICHAEL RODAK, JR., CLERK

No.

In the

Supreme Court of the United States

October Term, 1977

DONALD R. GRATEHOUSE

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DONALD R. GRATEHOUSE, PRO SE
2228 Georgian Woods Place
Wheaton, Maryland 20902

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Title 28 U.S.C., Section 1491 (1970)
Title 28 U.S.C., Section 2101(c)

Title 5 C.F.R., Section 351.407
Title 5 C.F.R., Section 752.201

Miscellaneous:

17 Am Jur. 2d, Section 157, 159
17 Am Jur.,Contracts, Section 165

IN THE

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No.

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Petitioner

v

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

TO: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims entered on the 29th day of April, 1977, denying the Petitioner's Motion for Rehearing or for Rehearing en banc.

OPINION BELOW

The opinion of the United States Court of Claims, dated February 4, 1977, (captioned "Order"), not reported here, is printed in the Appendix to the Petition along with the Order denying the Petitioner's Motion for Rehearing or For Rehearing en banc, dated the 29th of April, 1977. Opinions from an earlier Court of Claims decision, dated March 9, 1975, and four opinions from the Civil Service Commission, dated November 4, 1971, May 5, 1972, October 6, 1975 and March 18, 1976, are likewise printed in the Appendix.

JURISDICTION

The jurisdiction of this Court is based on Title 28 U.S.C. §1255(1), Title 28 U.S.C. §2101(c) and 5 U.S.C. §5335.

The jurisdiction of the Court of Claims in invoked under 28 U.S.C. §1491 (1970) and 5 U.S.C. §5596 (1970).

QUESTIONS PRESENTED

Whether or not a federal agency, acting pursuant to 5 U.S.C. §5335 can grant to a member of the competitive service of the United States, a within-grade increase when the agency has prior thereto determined that the employee was not performing at the required level of competence, as consideration for the employee's resignation.

Whether a federal agency can "misuse" its authority, pursuant to 5 U.S.C. §5335 by conferring upon persons determined by the agency to be below the minimum required level of competence, in order to obtain the resignation of an employee.

STATEMENT OF THE CASE

DONALD R. GRATEHOUSE was, at the time of his resignation which forms the basis of his claim here, on the date of his resignation (September 4, 1971) a GS-13, Step 4, Economist with the Department of Housing Development (HUD). He had at the time of his resignation approximately 17 years of federal service.

On March 19, 1971, the Plaintiff received a

notification from his supervisor (Appendix p.20), indicating that his performance was not at a minimum level of competence, and accordingly, a within-grade (WGI) pursuant to 5 U.S.C. §5335 and 5 C.F.R. §531.407 (Appendix pp. 17 & 18), was being "indefinitely withheld". The Petitioner, concerned with the effect that such a determination would have on his otherwise exemplary record, entered into an agreement with the agency that in exchange for the agency's granting the previously withheld WGI, the Petitioner would resign, effective September 4, 1971. After the employee had attempted unsuccessfully to withdraw his resignation, he filed, in a timely manner, on September 15, 1971, an administrative appeal with the Civil Service Commission seeking reinstatement and back pay pursuant to the provisions of 5 C.F.R. §752.201 .

Thereafter, the Appeals Examining Office of the Civil Service Commission (AEO - now referred to as the Federal Employee Appeals Authority - FEAA) issued its decision in favor of the Petitioner. In a timely manner, the decision was appealed by HUD to the Board of Appeals and Review (BAR - now referred to as the Appeals Review Board - ARB), which reversed the decision of the FEAA and, thereby, upheld the Petitioner's separation.

On August 31, 1973, Petitioner filed his Complaint in the United States Court of Claims

which, after oral argument, on March 19, 1975, entered an Order remanding the matter to the Civil Service Commission (SCS) for an evidentiary hearing and a decision.

At that hearing, the agency witnesses who testified admitted that the WGI which was granted to Petitioner, was granted despite the fact Petitioner did not ... "clearly meet the statutory standard for such award .... ", contrary to the provisions of 5 C.F.R. §531.407(c)(1).

Additionally, the same witnesses testified before the CSC Hearing Examiner that they had concluded, prior to the granting of the WGI, that Petitioner did not meet the ..."acceptable level of competence....", within the meaning of 5 U.S.C. §5335 (1970). As a result of the hearing, the Examiner found in the Petitioner's favor.

Thereafter, HUD again appealed the lower CSC decision to the ARB, which <u>again</u> reversed in favor of the agency. The Court of Claims, which never relinquished jurisdiction of the matter following the remand order, considered cross-motions for Summary Judgments by both parties. Following oral argument, on February 4, 1977, the Court of Claims, by an Order, granted Respondent's Motion and denied Petitioner's Motion. After a Motion filed by Petitioner for a Rehearing, or, in the alternative, for a Rehearing, <u>en banc</u>, the Court

on April 29, 1977, entered its final Order denying the Petitioner's Motion.

REASONS FOR GRANTING THE WRIT

1. The Interpretation of the Court of Claims of 5 U.S.C. §5335 has decided an important question of federal law.

In March, 1971, the Petitioner who was then employed by HUD received a letter from his supervisor critical of his performance, and, indicating that ..."your within-grade salary merit increase scheduled for June, 1971, is being indefinitely withheld....". This notification was inadequate under the regulations of the agency to accomplish the threatened action.[1]

After receiving this "determination", the Petitioner and the agency entered into an agreement that in exchange for the previous withheld "merit" increase, the employee would resign effective September 4, 1971. The agency was motivated by a desire to rid itself of an unwanted employee. The employee was motivated by a desire

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1 Compare 5 C.F.R.§531.407(b)(2) with §531.407(c)(3). The first reference section requires 60 days advance written notice of lack of "competent"performance. That notice is required to be followed by the notice requirement of the statute, which is the determination of minimal level of competence of 5 USC §5335.

to remove a threatened stain on his otherwise exemplary record in the federal competitive service.

Agencies of the federal government are enjoined by 5 U.S.C. §5335 to grant merit increases to employees who do not meet a satisfactory level of work performance.[2] The implementing regulations clearly caution the agency to make the required statutory determination upon the basis of work performance, and for no other reason. The regulations, in this respect, read as follows:

> 5 C.F.R. §531.407(c)(i), in part, provides:
> (c) Determination. In making his determination the head of an agency or his designee shall make effective use of this authority to stimulate optimum performance among his employees, and:
> (i) Shall not award within-grade increases to employees who do not clearly meet the statutory standard for such award ... (emphasis added)

Here, as this record reflects, the agency abused its authority granted by §5335, by using such authority to obtain the removal of a federal employee whose work it had already concluded did

[2] Section 5335, in part:
(c) When a determination is made under subsection (a) of this section that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration within his agency under uniform procedures prescribed by the Commission.

not meet the minimal standard of performance required by the agency. The dangers of such a procedure have already been recognized by the Court of Claims in Cosby v United States, 417 F.2d 1345, 1346 (1969), by Judge Nichols:

* * * * * * * * *

> If an employee's continued presence in an agency is regarded as undesirable, and if he tenders any piece of paper purporting to be a resignation, the temptation is to snatch at it, thus avoiding the complex ritual and uncertain outcome of an adverse action. It is, I believe, the duty of the personnel officer nevertheless to scrutinize the paper with care, and to reject it as a resignation if it states, clearly or ambiguously, that the resignation is coerced. * * * *
> The same is true if the statement is made in a separate communication submitted by the employee simultaneously or at any time before the purported resignation takes effect. * * * *

The Court of Claims countenanced this unlawful use by the agency of the agency's congressionally mandated authority based upon its assumption that the act of the Petitioner was "voluntary". In so doing, the Court of Claims ignored a well known principle of law, recognized by this Court ...

> "It is clear that the courts will not recognize or enforce, or hesitate to condemn contracts resting upon an illegal consideration. Illegal consideration

> consists of any act or forebearance, or a promise to act or forbear, which is contrary to law or public policy. It is insufficient consideration to support an agreement,[17] and an agreement founded upon it is illegal". 17 Am Jur 2d, §157,(See Footnote 17).[3]
>
> And,
>
> " An agreement which cannot be performed without a violation of the law is illegal and void[16], whether or not the parties knew the law.[17]" 17 Am Jur 2d,§159.[4]

Petitioner submits that since it was unlawful for the supervisor to grant that which the Petitioner wanted, the fact that the bargain was struck does not make it any less illegal. To hold otherwise provides the agency with the benefit of a bargain it had no authority to make, and provides the Petitioner, for consideration for his resignation, that which the agency was prohibited from giving. Inasmuch as both parties participated in the contract in exchanging a resignation for a WGI, the contract is void, and as the cases below indicate, neither party is in a position to enforce it. For the effect of the decision of the Court of Claims is to permit a federal agency to

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[3] McCullough v Virginia, 172 US 102, 43 L.ed.382, 19 S.Ct 134; Gill v Oliver,11 How(US) 529,13L.ed 799; Armstrong v Toler,11 Wheat(US)258,6 L.ed 468.

[4] Miller v Thompson,40 Nev.35,160 P 775; Texas Employers'Ins.Ass. v Tabor(Tex Com App)283SW 779.

purchase "by an unlawful use of its statutorily mandated authority" to grant merit increases only to those persons whose level of performance required it, a resignation by an employee.

The threat of abuse by agencies in the light of the Court of Claims decision here, is not only apparent, but real. For as we shall point out, once an agency is permitted to "purchase" a resignation with a false certification of competence, the agency may well decide to "purchase" other things from its employees with the same unlawful consideration.

It is for this reason we submit that the Court of Claims has decided an important question of federal law which has not been, but should be, settled by this Court. See Rule 19 of the Supreme Court.

2. The decision of the Court of Claims is in conflict with applicable decisions of this Court.

Ordinarily, of course, disputes concerning the granting or withholding of merit increases are generally dealt with by the agency and CSC administrative procedures. Accordingly, there is almost no decided case law with regard to the manner in which an agency is permitted to withhold or grant merit increases. Here, however, the

Petitioner contends that the agency had no authority to make the bargain that it did. The Court of Claims, in considering the Petitioner's argument in this respect, simply disposed of it by pointing out the Petitioner's concurrence in the bargain. The issue, we submit, is not so easily disposed of, for the issue is not whether the Petitioner did,or did not,voluntarily bargain for something he wanted in return for his resignation; rather, the issue is whether the agency had the power to make the bargain.

We have already pointed out, the agency, prior to the "bargain", had already made the determination the Petitioner was not performing at an acceptable level of competence. And once the agency had made this determination, unless somehow his performance had changed, we do not see any basis upon which the agency can change its mind to in fact certify one who is not competent, as competent. For the statute, 5 U.S.C. §5335(a)(3)(A), together with its implementing regulations which we have already cited, make it crystal clear that unless the employee's performance is found to be at an acceptable of performance, he simply is not entitled to his WGI.

The agency, in the letter of March 19, 1971,

clearly indicated that this was the decision that it had reached. Moreover, the official who made it reiterated his opinion at the hearing held in this respect that Gratehouse was not entitled to his WGI. It follows, that the agency had no more authority to grant the increase, than the Petitioner had to accept it in consideration for his resignation.

The principle of law we invoke is well known:

> "The well established general rule is that an agreement which violates a provision... of a statute, or which cannot be performed without violating such a provision, is illegal and void". 17 Am Jur2d Contracts §165, and cases cited at Note 8. [5]

To put it another way, once the agency had reached the conclusion that Petitioner was not entitled to his merit increase, to provide it to him in consideration for his resignation was beyond its power. This point can be made clearer by considering other situations. For example, suppose the agency refused to grant to an employee a merit increase unless he transferred, or, unless he consented to a reduction in grade, or unless he was willing to perform his work at a higher level without pay. Can there be much doubt that granting or withholding merit increases on these grounds is

contrary to the standard imposed by Congress.

Only a cursory reading of the implementing regulation determines the issue, for

The Head of the agency: [6]

> "Shall not award within-grade increase to employees who do not clearly meet the the statutory standard for such award."

Here the Agency cannot, we suggest, defend its illegality by claiming that this is what the employee wanted. For if the wishes of the employee are the governing standard, the regulations should so provide. But the perfidity of the action here involved is more serious, for viewed in context of what, in fact, occured, one is left with the conclusion that the agency, and particularly, the Petitioner's supervisor was not concerned with his promises, or his lawful duty. He was concerned in getting rid from the federal service an employee whom he considered undesirable and lacking in acceptable performance, and by whatever means he had at hand.

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5 Footnote 8.Ewert v Bluejacket,259 US 129,66 L.ed 858,42 S.Ct442; Connolly v Union Sewer Pipe Co.184 US 540,46 L.ed679,22 S.Ct431; United States v Trans-Missouri Freight Ass.166 US 290; Kaiser-Frazier Corp. v Otis & Co.195 F.2d 838; Ware v United States,154 F 577, cert.den. 207 US 588, 52 L. ed 353, 28 S. Ct.255.

6 See 5 C.F.R. §531.407(c)(i) (1971).

The avoidance by the Court of Claims in meeting the argument of Petitioner that the agency was permitted to use and abuse its authority to grant or withhold merit increases, thus, gives approval to federal agencies to obtain the benefits of what clearly is an unlawful bargain. This Court has repeatedly refused to permit parties to benefit by their unlawful bargains. It follows that this Court should grant the writ sought, examine the legality of the agency's actions and determine whether or not a federal agency may use its authority as is indicated here.

CONCLUSION

Your Petitioner says that the Court below has decided questions affecting the administration by a federal agency of a federal statute in a manner departing from that which was clearly intended by Congress, which permits great abuse, and which permits an agency to obtain the benefit of an illegal bargain. These questions are of great importance and have been decided in a manner departing from cognate cases.

Respectfully submitted,

DONALD R. GRATEHOUSE,Pro Se
2228 Georgian Woods Place
Wheaton, Maryland 20902
Phone: 933-3279

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition, with Appendix attached thereto, was mailed, first-class, postage-prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, this 27 day of AUGUST, 1977.

DONALD R. GRATEHOUSE

TITLE 5 (IN PART)
Chapter 53 (1970)

§5335. Periodic step-increases.

(c) When a determination is made under subsection (a) of this section that the work of an employee is not (emphasis added) of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Commission. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Commission. If the reconsideration or appeal results in a reversal of the earlier determination, the new determination supersedes the earlier determination and is deemed to have been made as of the date of the earlier determination. The authority of the Commission to prescribe procedures and the entitlement of the employee to appeal to the Commission do not apply to a determination of acdeptable level of competence made by the Librarian of Congress.

TITLE 5 - C.F.R.

(IN PART)

Chapter 1

§531.407 Work of an acceptable level of competence

(b) *Communication.* An agency shall establish procedures that ensure:

(1) That supervisors keep their employees currently advised of their performance, and

(2) That at least 60 days in advance of the date on which an employee will complete his waiting period, his supervisor shall inform him of any factor that raises a question about the employee's work being of an acceptable level of competence. However, a failure to inform or timely inform an employee under this paragraph does not delay or otherwise affect the determination required to be made under section 5335 of Title 5, United States Code, and this section.

(c) *Determination.* (1) In making his determinations, the head of an agency or his designee shall make effective use of this authority to stimulate optimum performance among his employees and:

(i) Shall not award within-grade increases to employees who do not clearly meet the statutory standard for such award, recognizing that for these increases performance must be of sufficient level to merit a pay increase, not just adequate for retention on the job; (emphasis added) and

(ii) Shall award within-grade increases to employees when they do clearly meet that standard and meet the other requirement of this subpart.

(2) The head of the agency or his designee in determining whether an employee's work is of an acceptable level of competence shall:

(i) Base his determination on the essential requirements of the employee's position;

(ii) Make the determination as of the completion of the waiting period;

(iii) Base his determination on the employee's performance during the waiting period; and

(iv) Record the determination in writing.

(3) When the head of an agency or his designee determines that an employee's work is not (emphasis added) of an acceptable level of competence (hereinafter referred to as "negative determination") under subparagraph (2) of this paragraph, he shall inform the employee in writing, not later than the completion of the waiting period:

(i) Of the basis for the negative determination; and

(ii) Of the employee's right to secure reconsideration of the negative determination as provided by paragraph (d) of this section and of the time limits within which the employee may request reconsideration.

(4) Failure to inform an employee of a negative determination as required by subparagraph (3) of this paragraph may not be the basis for changing a negative determination.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C. 20410

Office of the Under Secretary

MAR 19 1971

Mr. Donald R. Gratehouse
Economist
Office of Economic Analysis
Office of the Deputy Under Secretary
Department of Housing and Urban Development
Washington, D.C. 20410

Dear Mr. Gratehouse:

This is a very unpleasant letter for me to write and probably more unpleasant for you to read. It concerns your less-than-satisfactory performance as an economise, Grade GS-13, in the Economic Analysis since October 1970.

As a member of the staff responsible for providing economic intelligence in response to the needs of the chief officials of the Department, you were expected to keep abreast of important developments in the several fields that you were assigned to cover-- construction materials production and prices, building trades labor supply and wages, and the supply and prices of land needed for housing sites. Im monitoring these critical factors affecting housing production and costs, you were expected to maintain appropriate data series and to perform meaningful analysis at a level that reflects the competence of a GS-13 economist.

More specifically, you were requested in early October to prepare a study of land prices in anticipation of the work that needed to be done in connection with the preparation of the Third Annual Housing Goals Report. This study was never received. In early December, you were

assigned the specific responsibility for the preparation of Appendix D of the Third Annual Goals Report dealing with "Materials, Land and Manpower Requirements in Housing Production." Despite the repeated exhortations by your immediate supervisor, Duane McGough, and me, to have a draft of the Appendix ready by January 15, 1971-- the deadline established by the Deputy Under Secretary, nothing was received from you until the third and fourth weeks of January. The submitted data and drafts had to be completely revised by staffs of the Departments of Commerce and Labor as well as by other members of the Office of Economic Analysis in order to cast them into understandable language and relevant data comparisons.

Your unsatisfactory performance of these basic duties of your job was matched by your lack of concern for the work responsibilities of the Office. First, you had pursued the practice of reporting for work at around 9:30 am most mornings, sometimes as late as 9:45am, even though the regular work hours of the Office run from 8:45 sm yo 5:15 pm. Moreover, you were terribly put out by my insistence that you are expected to be in the Office by 8:45 am each morning, just as the other members of the staff are required to do.

Second, you had such little regard for the Office work for which you are responsible that you requested permission to spend half of your working time in working with the Office of the General Counsel as a means of furthering your law education. Considering the many tasks in your area of responsibility that remain undone, I, of course, refused to grant such permission.

Only after repeated requests, including a written memorandum, did you undertake to tabulate critical statistics on construction materials and labor,

even though such data are readily available from Federal agency and trade association reports. As yet, you have not submitted any analytical studies of such data showing: (a) the labor and materials requirements for typical housing units, (b) the competing demands for building materials and construction labor from commercial and industrial construction, (c) the degree of availability of substitues materials and labor force, in the event shortages arise, and (d) the capacity of the respective building material industries and construction labor force to expand in response to increasing construction rewuirements. Considering the abundance of economic and trade literature on these subjects, these analytical tasks should not have been too difficult to perform. Nonetheless, they have not been done, although you have been employed in the Office of Economic Analysis for over three years.

In checking with your former supervisors, officials of other agencies with whom you have dealings and with senior members of the Office, I learned that you low level of performance and competence persisted throughout the past three years. In fact, in one discussion with me concerning your unsatisfactory performance, you conceded that in the past you had a tendence to "goof off".

After consultation with the Deputy Under Secretary and with the Director of Personnel, I have prepared this written notice to advise you that your within-grade salary merit increase, scheduled for June 1971, is being indefinitely withheld and that your work performance is not of a caliber to merit continued employment.

Sincerely,
Arnold H. Diamond
Acting Director
Office of Economic Analysis

September 1, 1971

Mr. Arnold H. Diamond
Director
Office of Economic Analysis
Office of the Deputy Under Secretary
Department of Housing and Urban Development

Dear Mr. Diamond:

Last May 26, 1971, I signed a resignation in exchange for your signature giving me the normal step increase for my grade level. The effective date of the resignation was set for September 3, 1971. Had I not signed the resignation, it was your stated intention to deny the step-increase.

It is my informed belief that this resignation was the product of illicit actions and based on faulty contractual grounds. It is my further belief that this agreement involving a mutual exchange of personnel actions was itself founded on bad faith.

I, therefore, request the immediate return of my signed resignation.

Yours very truly,

Donald R. Gratehouse
Economist
Office of Economic
Analysis

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D.C. 20415

NOV 4 1971

Mr. Edward Williams, Director
Division of Technical Personnel Services
Office of Personnel
Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20414

Dear Mr. Williams:

This is in further reference to the September 15, 1971 appeal of Mr. Donald R. Gratehouse protesting the action of the Department of Housing and Urban Development in refusing to permit the withdrawal of his resignation submitted May 20, 1971, effective September 4, 1971; and your reply of November 2, 1971.

Chapter 715, Subchapter 2-3, of the Federal Personnel Manual contains the Commission's instructions to the agencies concerning withdrawal of resignation and reads in pertinent part:

> "When the agency does not permit the employee to withdraw his resignation before its effective date, the agency must have a valid reason for denying the withdrawal. Among the reasons that would be valid are a showing that it would cause administrative disruption or that the job has been committed to someone else. A desire to avoid taking adverse action would not be a valid reason for denying the withdrawal. Whatever the reason, it must be explained to the employee."

The record before us shows that Mr. Gratehouse and his representatives met with his supervisor and other officials of the Department on September 2, 1971, at which time the appellant submitted

to the Department his written request, dated September 1, 1971, that his resignation be returned. The Department denied his request. Your November 2, 1971 letter does not clearly state what explanation was given to Mr. Gratehouse by the Department for this action, nor does the appellant state precisely what reason was given to him for the denial of his request.

You did state in your November 2, 1971 letter that: "The withdrawal was denied for a valid reason: the position for which Mr. Gratehouse wasresigning was to be - and has since been-abolished as part of the reduction in staff of 800 employees in our Headquarters offices..."

We conclude , therefore, that the Department refused Mr. Gratehouse's request that his resignation be withdrawn in order to avoid the difficulties attendant upon following the required procedures necessary to separate him from a position which was to be subsequently abolished.

In view of the foregoing, we conclude that the Department did not explain to Mr. Gratehouse that it had a valid reason for denying his request that his resignation be withdrawn, nor did it in fact have a valid reason for this denial. We find, therefore, Mr. Gratehouse's resignation to have been effectively withdrawn on September 2, 1971, and his separation on September 4, 1971 was an adverse action subject to Part 752-B of the Civil Service regulations.

Section 752.202 of Part 752-B provides for certain procedures to be followed in effecting adverse actions, including removal. Among these are: providing the employee with 30 days advance written notice stating the reasons for the proposed action specifically and in detail; giving the employee a reasonable time to answer, personally and in writing; and

furnishing the employee with a decision in writing prior to the action being effected. Since this action was taken without following the procedures set forth in Section 752.202 of the regulations , we find Mr. Gratehouse's separation to be fatally defective from a procedural standpoint.

In view of the foregoing, we recommend that the Department of Housing and Urban Development restore Mr. Gratehouse to his former position retroactive to the day following the effective date of his removal, September 4, 1971. This decision relates only to a procedural deficiency and does not constitute any ruling on the merits or sufficiency of the reasons the Department may have for removing Mr. Gratehouse from the service.

This decision becomes a final decision of the Civil Service Commission unless the agency files an appeal, in duplicate, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, within fifteen (15) calendar days of receipt of this decision.

Sincerely yours,

Herman D. Staiman, Chief
Appeals Examining Office

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

Mr. James C. Curvey
Director
Office of Personnel
Department of Housing and Urban Development
Washington, D.C. 20410

MAY 5 1972

Dear Mr. Curvey:

This is in reference to the appeal which was submitted by your agency to the Board of Appeals and Review from a decision issued by the Commission's Appeals Examining Office on November 4, 1971 in the case of Mr. Donald R. Gratehouse. The Appeals Examining Office found that the separation by resignation of Mr. Gratehouse on September 4, 1971, was fatally defective from a procedural standpoint. The Appeals Examining Office based its decision on a finding that Mr. Gratehouse requested the withdrawal of his resignation before its effective date, that the agency denied his request, and the agency did not have, and did not offer Mr. Gratehouse a valid reason for its denial of his request for withdrawal of his resignation. Under the circumstances, the Appeals Examining Office found that Mr. Gratehouse's resignation was effectively withdrawn on September 2, 1971, and that his separation September 4, 1971, constituted an adverse action subject to Part 752-B of the Civil Service Regulations. Since the separation action was not taken in accordance with the procedures set forth in section 752.202 of those Regulations, it was found to be fatally defective from a procedural standpoint. Accordingly the Appeals Examining Office recommended that Mr. Gratehouse be restored to his former position retroactively to the day following the effective day of his removal.

By letter dated November 23, 1971, your agency appealed to the Board of Appeals and Review from the decision issued by the Appeals Examining Office. A copy of the appellate representations was furnished to Mr. Gratehouse who submitted comments thereon by letter dated January 13, 1972. A copy of Mr. Gratehouse's comments was furnished to your agency for information. Supplemental comments were then sent to the Board by your agency under date of February 22, 1972, and a copy thereof was furnished to Mr. Gratehouse for his information.

The Board of Appeals and Review has completed a careful review of the information of record in the light of the representations submitted in support of your agency's appeal, and the comments submitted by Mr. Gratefouse.

The record is clear that Mr. Gratehouse submitted his resignation in writing under date of May 20, 1971, and that he indicated that the action should become effective at the close of business on September 4, 1971. However, by letter dated September 1, 1971, submitted to the agency on September 2, 1971, he requested the immediate return of his resignation. The record shows that a meeting took place between Mr. Gratehouse and agency personnel on September 2, 1971. His request for withdrawal was not granted, and his resignation became effective on September 4, 1971.

In its decision, the Appeals Examining Office cited Chapter 715, Subchapter 2-3, of the Federal Personnel Manual which contains the Commission's instructions to agencies concerning the withdrawal of resignations. Those instructions provide that an agency must have a

valid reason for refusing to permit an employee to withdraw his resignation before its effective date, and further, that the agency must explain its reason to the employee.

In the instant case, Mr. Gratehouse submitted a written request for the withdrawal of his resignation after a period of more than three months had passed since he notified the agency of his desire to resign. The request for withdrawal was submitted prior to the effective date of resignation, but just barely so, as the effective date of resignation was imminent. It was, as the agency stated, an attempt to withdraw the resignation "at the eleventh hour".

There is no question that agency personnel gave consideration to Mr. Gratehouse's request for the withdrawal of his resignation. The record is clear that a meeting took place between Mr. Gratehouse and agency personnel on September 2, 1971, and that his request for withdrawal was discussed. Representations from both the agency and Mr. Gratehouse reflect that the request for withdrawal was refused, or denied. The agency contends that it was in the midst of a substancial reduction in its staff at the time, and that it so informed Mr. Gratehouse when he sought to withdraw his resignation. Representations made by Mr. Gratehouse indicate that, at the time of the meeting of September 2, 1971, a wage-price freeze in government was discussed.

In view of the foregoing facts and circumstances the Board of Appeals and Review finds that the agency gave consideration to Mr. Gratehouse's request for the withdrawal of his resignation, that it decided to deny his request for valid reasons, and that it so informed Mr. Gratehouse. Therefore, the Board finds that Mr. Gratehouse

did not effectively withdraw his resignation, and that his resignation properly became effective on September 4, 1971.

The Board of Appeals and Review hereby reverses the decision issued on November 4, 1971, by the Commission's Appeals Examining Office, and withdraws the recommendation for corrective action which was contained in that decision. Civil Service Regulations provide that decisions of the Board of Appeals and Review are final, and that there is no further right of administrative appeal.

For the Commissioners:

Sincerely yours,

William P. Berzak
Chairman

In the United States Court of Claims

No. 328-73

(Decided March 19, 1975)

DONALD R. GRATEHOUSE *v.* THE UNITED STATES

Ben Paul Noble, attorney of record, for plaintiff. *Noble, Mann, and Schoenfeld*, of counsel.

Frank H. Clabaugh, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, SKELTON, and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

Plaintiff seeks back pay and reinstatement to his position by reason of an alleged procedural error on the part of the Civil Service Commission (CSC) in failing to consider and decide plaintiff's claim that his resignation from departmental employment was coerced. Defendant argues that the claim of duress is simply an afterthought of plaintiff's, that he did not even raise the issue before the effective date of his resignation, and that, therefore, the agency and the CSC did not consider it and violated no adverse action procedures, as alleged by plaintiff. Defendant asks that we dismiss the

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claim or remand it to the CSC for a hearing on the merits of the allegation of resignation induced by coercion.

We conclude upon a consideration of the briefs, including supplemental briefs requested by the court, and upon oral argument, for reasons hereafter stated, that plaintiff is not presently entitled to back pay or reinstatement. However, pursuant to Pub. L. 92–415, 86 Stat. 652 (1972), we remand to the CSC for a hearing on the merits of plaintiff's claim of coerced resignation.

Until his separation on September 4, 1971, plaintiff was a career Government employee (economist, GS–13, step 4) with the Department of Housing and Urban Development. On March 19, 1971, plaintiff's supervisor informed him in detail, by letter, that plaintiff's job performance for the past 3 years was unsatisfactory, that as a consequence an in-grade salary merit increase scheduled for June 3, 1971, was being "indefinitely withheld," and that plaintiff's work was "not of a caliber to merit continued employment." Following receipt of this letter, plaintiff met with the Deputy Under Secretary, who, after hearing plaintiff's response, advised him that he might consider seeking other employment. Subsequent efforts to secure other employment were, however, unsuccessful.

A very real concern for plaintiff during this period was that the denial of the in-grade salary increase would be a blot on his personnel record and reduce opportunities for future employment. As a result of this concern, plaintiff agreed to submit his resignation—dated May 20, 1971, though not effective until September 4 of that year—in return for his receiving the in-grade increase. This arrangement appears to have been at plaintiff's suggestion.

On September 2, 1971, 2 days before the effective date of his resignation, plaintiff submitted a letter dated September 1 to his supervisor. The letter requested the immediate return of his resignation, and charged for the first time that the resignation had been the product of unspecified "illicit actions" and "bad faith" on defendant's part. At a meeting of plaintiff and HUD personnel on the same day, his request for withdrawal of resignation was denied. However, plaintiff was offered a 60-day temporary appointment in order to give

him more time to find another position. Plaintiff rejected the offer and he was separated on September 4, the effective date of his resignation.

Plaintiff timely appealed his separation to the CSC on September 15, 1971, alleging, for the first time explicitly, that his resignation was involuntary within the meaning of chapter 752 of the Federal Personnel Manual.[1] Specifically, he alleged deception, intimidation, time pressure, and duress. In reply, the agency argued that the resignation was voluntary and that it had a valid reason for refusing plaintiff's requested withdrawal of the resignation. The chief of the CSC Appeals Examining Office, noting that pursuant to FPM chapter 715, subchapter 2–3, the agency was required to "have a valid reason for denying the withdrawal," ruled on November 4, 1971, that HUD had not stated a valid reason or communicated one to plaintiff, that his separation was therefore an adverse action, subject to 5 C.F.R. Part 752–B (1972), and that the regulations pertaining to such action had not been followed. It was recommended that plaintiff be restored to his position retroactive to September 4. The Appeals Examining Office stated that it was ruling only that there had been a procedural deficiency and that the decision "does not constitute any ruling on the merits or sufficiency of the reasons the Department may have for removing Mr. Gratehouse from the service." We note also that the decision made no reference to plaintiff's claim that his resignation was involuntary from its inception.

HUD promptly appealed the foregoing decision to the CSC's Board of Appeals and Review (BAR). HUD's letter of appeal asserted that the agency had valid reasons for refusing to permit the withdrawal of plaintiff's resignation and reiterated that the May 20, 1971 resignation was entirely voluntary. HUD alleged, among the grounds for its action, that plaintiff's position had been eliminated and that he had been replaced by another person with a GS–9 rating. Returning plaintiff's resignation would thus have created adminis-

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[1] FPM Supp. 752–1, § S1–2a(1) (1972), states, in pertinent part:

"• • • [A] normally voluntary action—i.e., a resignation, optional retirement, or reduction in rank or pay at the employee's request—is an adverse action if it is obtained by duress, time pressure, intimidation, or deception. • • •."

trative disruption, in HUD's opinion. Such disruption and reassignment was sufficient to support HUD's actions pursuant to CSC regulations and chapter 715, subchapter 2-3, of the Federal Personnel Manual (June 21, 1971):

> * * * When the agency does not permit an employee to withdraw his resignation before its effective date, the agency must have a valid reason for denying the withdrawal. Among the reasons that would be valid are a showing that it would cause administrative disruption or that the job has been committed to someone else. A desire to avoid taking adverse action would not be a valid reason for denying the withdrawal. Whatever the reason, it must be explained to the employee. * * *.

Plaintiff contested HUD's assertions.

In its decision of May 5, 1972, the Board of Appeals and Review reversed the Appeals Examining Office, finding that HUD's stated reasons for refusal to permit withdrawal of the resignation were within required guidelines and valid. Plaintiff's resignation, the board stated, "properly became effective on September 4, 1971." Thus, the board did not directly address the allegation in plaintiff's appeal that his resignation was involuntary due to intimidation and deception. This, plaintiff now says, was a procedural violation of adverse action regulations contained in 5 C.F.R. Part 752 (1972), entitling him to back pay and reinstatement regardless of the merits of his claim of coercion and deception. He says that he was entitled to a hearing by the CSC on his charge. Plaintiff raises his right to a hearing for the first time in this pending motion. He did not complain to the CSC about its failure to accord him any procedural rights nor that it had failed to speak to his charge of involuntary resignation. Plaintiff's petition to the court was filed on August 23, 1973. It was amended on April 4, 1974.[2] Plaintiff's motion for summary judgment was filed on July 3, 1974.

It is now hornbook law in our jurisdiction that an involuntary resignation constitutes an adverse action by the agency.

[2] Plaintiff's first amended petition charges that he was separated on the basis of agency action alleged to be arbitrary and capricious and in violation of agency law and regulation. Plaintiff's motion for summary judgment is limited, however, to the rights of plaintiff by reason of failure of CSC to accord him his procedural rights to a hearing on the merits of the allegation that his resignation was void and illegal because obtained by duress. This opinion is limited to this issue raised by the motion.

FPM Supp. 752-1, § S1-2a(1); *McCormack* v. *United States*, 204 Ct. Cl. 371 (1974); *Cosby* v. *United States*, 189 Ct. Cl. 528, 417 F. 2d 1345 (1969). Where there is a nonfrivolous allegation by a Government employee that his resignation was involuntary, he is entitled, in the usual case, upon timely appeal to CSC, to a hearing before that body. 5 C.F.R. Parts 752, 772 (1972); *Goodman* v. *United States*, 358 F. 2d 532 (D.C. Cir. 1966); *Dabney* v. *Freeman*, 358 F. 2d 533 (D.C. Cir. 1965); *McCormack* v. *United States*, *supra*; *Cunningham* v. *United States*, 191 Ct. Cl. 471, 423 F. 2d 1379 (1970). Where it is found that an adverse personnel action has been carried out in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay of which he has been illegally deprived. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Leone* v. *United States*, 204 Ct. Cl. 334 (1974); *Jones* v. *United States*, 203 Ct. Cl. 544 (1974); *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 354 F. 2d 358 (1965). Exceptions are made to the rule where the procedural error is deemed harmless.[3]

Against the background of these general rules we have the facts of this case illustrating abundant procedural blunders by both sides, sufficient to mislead both. As to plaintiff, he never argued to his department that his resignation was being coerced. He only requested, over 3 months after he submitted his resignation, and 2 days before it was to become effective, that he be permitted to withdraw it. Until plaintiff appealed to the CSC there was no reason to believe that plaintiff viewed his resignation as involuntary. His memorandum of appeal to the CSC spoke of coercion for the first time and referred to FPM chapter 752. At that point the CSC Appeals Examining Office focused on the requirement of FPM chapter 715 that an agency must have a valid reason

[3] *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969); *McCallin* v. *United States*, 180 Ct. Cl. 220 (1967); *Creamer* v. *United States*, 174 Ct. Cl. 408, *cert. denied*, 385 U.S. 819 (1966); *Greenway* v. *United States*, 163 Ct. Cl. 72, 80 (1963), 175 Ct. Cl. 350, *cert. denied*, 385 U.S. 881 (1966). A prejudicial procedural error is not rendered harmless, however, because the merits of the dispute appear to be clearly against the employee. *Bell* v. *United States*, 366 U.S. 393 (1961); *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 354 F. 2d 358 (1965); *Garrett* v. *United States*, 169 Ct. Cl. 186, 340 F. 2d 615 (1965).

for refusing to permit withdrawal of a resignation. In reviewing the action of the Appeals Examining Office the BAR apparently never realized that plaintiff had made a claim of involuntary resignation, for it focused entirely on the issue of whether or not the decision of the Appeals Examining Office was sustainable. This oversight is not difficult to understand in the context of events leading to the resignation and the demand for its withdrawal, for until *after* plaintiff left the Government payroll there was no issue about an involuntary resignation.

When the BAR decision came down, it should have been instantly clear to plaintiff that the BAR had failed to consider what plaintiff now says is his primary claim—coercion. Yet, he made no attempt to bring the oversight to the BAR's attention. 5 C.F.R. § 772.308 (1972) provides that a party may request reconsideration of a decision where it is believed that a procedural or substantive error has been made. Plaintiff did not exhaust his opportunity to gain such reconsideration at the administrative level. If an employee sincerely feels that there has been an oversight of this kind on his appeal, yet he does not say anything about it or use the regulations designed to correct such error, questions arise as to the fairness of his failure to do so. It is unjust to keep silent and many months or even years later in a lawsuit make the point while back pay has been allowed to accumulate. We do not impute improper motives to plaintiff here but, of course, the result of what he did is the same as if he had acted deliberately to capitalize on a technical oversight to maximize his claimed damages. On the other hand, the board's decision stated that "there is no further right of administrative appeal." Plaintiff might fairly have assumed from this that he had no opportunity for reconsideration. As we have said, both sides contributed to this confusion and must share the responsibility for failure of the CSC to render a decision on the coercion issue. But, the comedy of errors does not end here.

At some time before plaintiff's motion for summary judgment was filed on July 3, 1974, counsel for defendant in a telephone conversation offered plaintiff a hearing before the CSC. Defendant's attorney emphasized in oral argument

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that the offer of a hearing was made as a matter of "grace," not as an admission of any prior procedural error. He also stated that the hearing was to have retroactive effect, *i.e.*, a decision against plaintiff on the duress question would preclude any recovery of back pay by plaintiff. The plaintiff refused the offer.

The consequences of a refusal to accept an agency's offer to remedy a possible, though disputed, procedural error will depend on the timing and nature of the offer. We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time. Recently, in fact, we applied this rule specifically to the CSC. *Bookman* v. *United States*, 197 Ct. Cl. 108, 453 F. 2d 1263 (1972). In *Bookman* we noted at 111 (453 F. 2d at 1265) that "reconsideration is often the sole means of correcting errors of procedure or substance." We stated further:

> * * * this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period. * * *. [197 Ct. Cl. at 112–13, 453 F. 2d at 1265.]

What is a short and reasonable time period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years. A correction of an error within a reasonable time period will have retroactive effect, or, in other words, will preclude any cause of action based on the original error.

Where reasonable time for reconsideration has expired, there is no longer an opportunity to correct the procedural error retroactively. *Vitarelli* v. *Seaton*, *supra*; *Manzi* v. *United States*, 198 Ct. Cl. 489 (1972); *Hanifan* v. *United States*, *supra*. This is true because, generally speaking, separation of an employee in violation of procedural regulations is illegal and void, except where it is harmless error. The employee in effect was never separated, and never stopped drawing his pay. *Service* v. *Dulles*, *supra*; *Jones* v. *United States*, *supra*. In sum, where a prejudicial procedural error has been committed, and a reasonable time for reconsideration has run, the purpose of a correction of that error can only be to determine the merits of the dispute *prospectively*.

In the instant case, defendant's offer of a CSC hearing 2 years after a hearing could have been held was far too late to qualify as reconsideration. Thus, plaintiff was entirely justified in refusing the offer, once it was ascertained that any decision arising out of that hearing was to have retroactive effect. Had he accepted such an offer, plaintiff would have waived any right he might have had under different circumstances to recover back pay as a result of the alleged faulty procedure.[4]

We come down now to the two central issues of the case—did defendant violate its regulations by not affording plaintiff a prompt hearing on his claim of forced resignation made after the effective date of that resignation? And, can we, as plaintiff insists, find for plaintiff on the merits of his claim that his resignation was forced?

As to the first point, it is plaintiff's position that regardless of when he charged coercion, defendant committed a breach of regulations since it did not afford him a hearing on his charge. He says that such a violation entitles him to back pay regardless of the merits of his claim of coercion. We note that plaintiff's appeal to CSC was within 15 days after the effective date of his resignation and that he therein asserted facts as to coercion which, standing alone, entitled him to adverse action procedures, including a hearing by CSC. As we have said, it is defendant's failure to accord plaintiff such a hearing that gives rise to the back pay claim. It is clear to the court from the supplemental briefs and exhibits that there was no requirement by regulation that plaintiff must first raise the issue of coerced resignation before his department before going to CSC about it, assuming timely appeal to CSC, as here. It is equally clear from regulations set forth in the HUD Handbook, § 771.3, Adverse Actions and Appeals, which plaintiff admits he had access to and knew about, that plaintiff could have claimed before his department that he was the victim of an adverse action and that he would have obtained a hearing on the charge. But, he elected to go to CSC.

[4] On the other hand, we do not believe that the Government is helpless to prevent the continuing cumulation of back pay during litigation where the Government is charged with violation of procedural regulations. If defendant offers, in writing, to correct the procedural shortcomings alleged by an employee, which will have prospective effect only, then a refusal of that offer by a plaintiff would, we think, limit his period of recovery to the date of that offer. Whether such an offer is or is not accepted, defendant may continue its defense in this court of the procedures employed in the initial decision. If a stay of proceedings in this court were required while the corrected procedures went forward, it would be freely given in appropriate circumstances.

Plaintiff's claim suffers from the disability that his separation was not the result of a violation of procedural regulations by his agency. Any such violation came only after he was no longer a Government employee and on a charge of such violation raised at that time. This plainly served to confuse defendant as to what plaintiff's real claim was, and plaintiff cannot escape responsibility for contributing to that confusion and for his failure even to call to the attention of the BAR his charge, first made in court, that it had committed what he believed to be procedural error. The standard rules heretofore referred to thus do not fairly fit the facts of this case. Additionally, plaintiff gives us no reason whatever for his failure to raise the coercion issue before he went off the payroll. If he believed he was coerced, he had several months to claim it before his resignation became effective. There is no reason to assume that had plaintiff thus exhausted his administrative remedy in the regular way he would not have been accorded all procedural rights. Plaintiff knew what his rights were all along, unlike in *McCormack* v. *United States*, *supra*.

In these circumstances, therefore, where plaintiff bears a heavy responsibility for his failure to receive a timely hearing on a charge he did not raise, and does not explain why he did not raise it while in defendant's employment, and where no regulations are proven to have been violated prior to his leaving that employment, we think it is harmless error if there is any error, and that the rule reiterated most recently in *Hart* v. *United States*, 204 Ct. Cl. 925 (1974), *cert. denied*, —— U.S. —— (Dec. 9, 1974), should apply:

> * * * In *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967), this court held that a plaintiff is required to show "demonstrable prejudice" to support a charge of procedural error. We see no such prejudice in this case. * * *. In fact, any financial prejudice involved could be remedied,

> if a claim could be made out, by administrative action or under the Back Pay Act, 5 U.S.C. § 5596 (1970) * * *.

We would only add that any other rule would put a premium on form rather than substance and permit a plaintiff to recover for technical rule infractions without demonstrated prejudice flowing therefrom. We decline to recognize such a result as in the interests of proper administration of justice. Fortunately, under our procedures and jurisdiction there is a way to get directly to the merits of a serious charge such as plaintiff raises here. We turn, therefore, to plaintiff's claim which the CSC did not face—was plaintiff's resignation induced by coercion of defendant?

Plaintiff's claim for back pay and reinstatement to his position, from which he claimed he was neither legally removed nor legally resigned, cannot be determined without a hearing on the merits of his allegations that the resignation was improperly induced by defendant. This is an issue of disputed fact that cannot be resolved on these pending motions. *Paroczay* v. *Hodges*, 297 F. 2d 439 (D.C. Cir. 1961). Plaintiff claims that he was tricked and deceived, pressured and intimidated. Defendant says that the claim is in bad faith because defendant at the departmental level addressed and repudiated all charges made by plaintiff concerning refusal of his attempt to withdraw the resignation and that these charges were dismissed by the CSC as well. Defendant says that the claim of a coerced resignation is pure afterthought since it was not raised before HUD although there was ample opportunity to do so, that it was not raised even with the CSC until about 4 months after the resignation was submitted to HUD by plaintiff, and that the issue was not raised at all until after plaintiff's resignation had become effective. Defendant would have us conclude from all this that plaintiff has created a lawsuit by his own failures on the job and that these failures led to plaintiff's offer to resign in order to get the step pay increase. But, we do not know and can conclude nothing from the motion papers about the quality of plaintiff's work. Defendant also says that the claim is an afterthought because plaintiff could not find another job although he conducted a long search made possible by his selecting a delayed date for his resignation to go into effect.

Defendant offered plaintiff still additional time to job-hunt but it was refused. Defendant charges that plaintiff actually sought an extension of the resignation date shortly before he raised the coercion issue. Defendant concludes that this case is just an effort by plaintiff to reap a windfall for the consequences of his failure to perform on the job and that, in any event, he cannot be reinstated to a position that was abolished.

These contentions, of course, all require proof. As in *McCormack* v. *United States*, *supra*, *Goodman* v. *United States*, *supra*, and *Dabney* v. *United States*, *supra*, it is proper that this issue of whether the resignation was in fact voluntary be decided in the first instance by the Civil Service Commission to which it is remanded for hearing and decision. If plaintiff wishes to pursue the matter further he has the burden of proving that his resignation was not voluntary. *Leone* v. *United States*, *supra*. The criteria for deciding the issue are set forth fully in the CSC regulations, Federal Personnel Manual, and in decided cases. *Pitt* v. *United States*, 190 Ct. Cl. 506, 420 F. 2d 1028 (1970); *Dabney* v. *Freeman*, *supra*; *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).

If defendant made a mistake for which plaintiff must be compensated, it will not be because under the facts we have on the motions defendant can fairly be charged with violating regulations. It is not necessary to find such violation now for plaintiff to recover, however, if he can establish the truth of his claim of coercion. If through defendant's oversight in not addressing one issue in plaintiff's appeal to CSC, delay has been occasioned as to a hearing which might have been afforded sooner, it is not plaintiff who will lose thereby. If back pay is due because plaintiff sustains his claim, he will have established the prejudice he has suffered and will have to be made whole for it by defendant, back to September 4, 1971, with appropriate offsets required by law. *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968); Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), 80 Stat. 94.

Pursuant to our authority by rule and the remand statute, 28 U.S.C. § 1491 as amended by Pub. L. 92–415, 86 Stat. 652 (1972), the case is remanded to the Civil Service Commission

for a hearing on plaintiff's charge of resignation induced by defendant's coercion. Further proceedings in court are suspended for a period of 6 months from this date. Plaintiff's counsel is designated to advise the court by letter to the trial judge of the status of the remand proceedings pursuant to Rule 149(f). Attention of counsel and the Commission is also directed to Rule 150. The motion for summary judgment and cross-motion for summary judgment are allowed and denied consistent with this opinion.

U.S. GOVERNMENT PRINTING OFFICE: 1976

UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL EMPLOYEE APPEALS AUTHORITY

WASHINGTON, D.C. FIELD OFFICE

Washington, D.C. 20415

APPEAL OF DONALD R. GRATEHOUSE
UNDER PART 752, SUBPART B, OF THE CIVIL SERVICE REGULATIONS

DECIDED on OCT 6 1975

I. INTRODUCTION

On March 19, 1975 the United States Court of Claims issued decision number 328-73 in the case of Donald R. Gratehouse v. the United States, in which it remanded the case to the Civil Service Commission "for a rehearing on Plaintiff's charge of resignation induced by Defendant's coercion". The Defendant referred to is the Department of Housing and Urban Development (HUD).

II. BACKGROUND

By letter dated September 15, 1971 Mr. Gratehouse submitted an appeal to our predecessor office, the Appeals Examining Office (AEO),

United States Civil Service Commission, in which he alleged that his separation by resignation from his Economist, GS-110-13, Step 4, $19,537 per annum position with HUD in Washington, D.C., effective SEptember 4, 1971, "was the product of coercion and constitutes an involuntary discharge". He also presented evidence to show that he requested the return of his resignation on September 1, 1971; and that his request was denied on September 2, 1971.

On November 4, 1971 AEO issued a decision in which it found that the agency did not give the appellant a valid reason for denying his request for the withdrawal of his resignation; that the agency did not have a valid reason for its refusal; that Mr. Gratehouse's resignation was, therefore, effectively withdrawn on September 2, 1971; and that the agency's action in separating him on September 4, 1971 was an adverse action subject to the Commission review under Part 752 of the Civil Service Regulations. It found further that the agency's action was fatally defective from a procedural standpoint, and recommended that HUD restore the appellant to his former position. The decision made no finding on the appellant's allegation that his resignation was obtained by coercion.

The agency appealed the AEO decision to the Commissions's Board of Appeals and Review (BAR) on November 23, 1971. BAR issued its decision on May 5, 1972 in which it found that HUD did give consideration to Mr. Gratehouse's request for the withdrawal of his resignation;

that HUD had a valid reason for doing so; and that HUD informed the appellant of this reason. BAR reversed the November 4, 1971 decision of the AEO, and withdrew the AEO's recommendation for corrective action. It also made no finding on appellant's allegation that his resignation was obtained by coercion.

Mr. Gratehouse filed his petition with the United States Court of Claims on August 23, 1973, and the Court issued its decision on March 19, 1975 as noted supra. The hearing ordered by the Court of Claims was held at Washington, D.C. on June 13, 1975. Mr. Gratehouse was represented by Ben Paul Noble and Craig T. Sawyer, Attorneys at Law. HUD was represented by Mrs. Ellen Banta and Mr. William L. Johncox, Attorney-Advisors. Five witnesses, including the appellant, testified at the hearing.

III. ANALYSIS AND FINDINGS

Federal Personnel Manual Supplement (FPM Suppl.) 752-1 contains the Commission's principles, interpretations and policies pertaining to the adverse action regulations. The following quotation from FPM Suppl.752-1, Subchapter S1-2, which is concerned with voluntary and involuntary separations and reductions, is important to our adjudication of this appeal:

"a. General (1) Separations and reductions in rank or pay voluntarily initiated by an employee are by their very nature actions which do not require the use of adverse action procedures. On the other hand, a normally voluntary action--i.e., a resignation, optional retirement, or reduction in rank or pay at the employee's request-- is an adverse action if it is obtained by duress, time pressure, intimidation or deception. Whether an action is voluntary or involuntary is determined not by the form of the action, but by the circumstances that produced it.

(2) The Commission holds that an action requested by an employee is voluntary only if the employee has freedom of choice. The general principle is that an action is voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. (See McGucken v. U.S. for similar characteristics the courts consider when determining the voluntariness of an action.)"

Turning to the facts in this case, Mr. Gratehouse signed part III. of a Standard Form 52 (SF 52) on May 26, 1971. This date was established by his testimony and that of all of the witnesses at the hearing who had personal knowledge of the resignation episode. The only handwriting on that part of the form is the appellant's signature. The following information was typed on the form: "date resignation is written" is shown as "5/20/71"; the reason for resigning is shown as "to accept a new position"; and the effective date of the resignation is shown as "c.o.b.9/4/71". Appellant testified that he did none of this typing.

Four witnesses having first-hand knowledge of the resignation episode testified at the hearing namely: the appellant himself; Mr. Arnold H. Diamond; Mr. Duane T. McGough; and Mrs. Willa Mae Cook. Their testimonies are discussed below.

The appellant testified that in late 1970 Mr. Diamond became the Director of the Office of Economic Analysis, HUD. His first contact with the new Director took place shortly after Mr. Diamond entered on duty when he sought approval of a request for his reassignment to the General Counsel's Office of the agency. He was then attending law school. He alleged that Mr. Diamond was annoyed with this request and disapproved it. From this bad start his association with the Director gradually worsened. Eventually, Mr. Diamond took over his direct supervision from his immediate supervisor,Mr. McGough. This resulted in numerous "confrontations" between himself and Mr. McGough concerning the manner in which he was performing his assignments. Finally, on March 19, 1971 Mr. Diamond wrote him a letter concerning his "less-than-satisfactory performance as an Economist, GS-13." The Director pointed out specific instances of this alleged poor performance in his letter, including "such little regard" for the office work for which he was responsible that he had requested permission to spend half his time working in the Office of the General Counsel. The letter closed with this paragraph:

> "After consulting with the Deputy Under Secretary and with the Director of Personnel, I have prepared this written notice to advise you that your within- grade salary increase, scheduled for June 1971, is being indefinitely withheld and that your work performance is not of a caliber to merit continued employment."

The appellant prepared a written response to this letter, which he discussed with Mr. McGough and then with the Deputy Under Secretary, Mr. Orlebeke. After discussing the matter with him, the latter advised appellant that because there appeared to be a personality conflict between appellant and Mr. Diamond the matter would be handled informally (Hearing Transcript, hereafter called HT, page 32). As a result, appellant's written response to the March 19, 1971 letter was never given to Mr. Diamond.

An agreement was worked out through Mr. Orlebeke. Appellant, Mr. McGough and Mr. Diamond discussed this agreement, the essence of which was that Mr. Gratehouse was to look for a job outside the Office of Economic Analysis, and that Mr. Diamond would not say anything adverse about him to any other potential employer (HT p.33. He did seek other employment, including positions in other HUD offices, and Mr. Diamond gave him some assistance in his search. In late April 1971 he applied for, and was actively being considered for a position in the Federal Housing Administration, HUD, which would have resulted in a promotion. However, he didn't get the job because Mr. Diamond gave a poor reference to Mr. Doan, the person who was considering him. As a consequence, Mr. Orlebeke's assistant, Mr. Ganley, "read the riot act" to Mr. Diamond. (HT 36-41). He subsequently received no offers of employment prior to his leaving the agency.

From the end of March forward, Mr. Gratehouse alleged that Mr. Diamond reminded him constantly that "I've got to do something because the in-grade is coming due and I want to keep my options open." (HT p.34) Finally, towards the end of May Mr. Diamond came in to see him and said: "All right, what are my options, what are we going to do, it's only a week off?" He responded by telling Mr. Diamond that the Deputy Under

Secretary could reassign him; that he could resign; or that the Director could give him the within-grade increase and he could continue looking for other employment. He alleged that "all of a sudden he (Mr. Diamond) turned quiet and ran out of the office." Mr. Gratehouse then discussed the conversation with Mr. McGough who advised him that he shouldn't have mentioned resignation as a possible alternative. He then told Mr. McGough to advise the Director "that no way in this world is resignation any kind of possibility so he can strike that off his list" (HT pp. 44-45). He admitted being concerned that the withholding of his within-grade increase would be a black mark on his record which would make future promotions difficult, but denied that he was concerned that this might hurt any political ambitions he might have since he had none at the time.

Mr. Gratehouse testified that toward the end of May he was getting to the point where he couldn't produce and that he got physically ill with stomach cramps. As a consequence he took sick leave beginning May 24, 1971 preparatory to entering Georgetown University Hospital for tests. On Tuesday, May 25, 1971, he received a call from Mr. McGough who asked him to report to Mr. Diamond's office the following morning for a meeting. When he asked Mr. McGough what the meeting was about, he was told "Well, I think there's something cooking and you'd better check in and maybe he's going to ask you to resign." He reminded Mr. McGough that he had told him the preceding Friday that didn't intend to resign, but the latter told him to come in and see what it was all about. He then called Mr. Ganley and was advised that Mr. Diamond was going to make him an offer and he should take it "whatever it is". He also called the personnel director and left messages, but his calls were not returned. (HT pp 45-48).

On Wednesday, May 26, 1971 he attended the meeting which was held in Mr. Ganley's outer office. Mr. Diamond, Mr. McGough, and Mr. Ganley's secretary, Mrs. Cook, were present. Mr. Diamond got the resignation form from Mrs. Cook and offered to sign the "in-step increase" if Mr. Gratehouse would resign. He showed Mr. Gratehouse the within-grade form. Appellant signed the resignation form effective "September 3, 1971" at the same time Mr. Diamond signed the form granting him his within-grade increase. He testified that although he had no intention of resigning, he did so for the following reasons: Mr. McGough had indicated "This is probably the best deal you're going to get"; Mr. Ganley had advised him "Take whatever you can get because it's the best thing we can do for you";because he was afraid of never getting" any kind of decent job in government if I had an in-grade denial on my record"; and because Ms. Debbie DeSault, who handled personnel matters in his area, and who he had seen in her office "shortly before this cross-exchange", had advised him "I think it's a dirty trick but it's probably legal". The effective date of the resignation was set some months in the future at the end of a pay period, after some discussion between the parties present, in order to give him more time to seek other employment. Mr. Gratehouse could not recall visiting the agency to discuss the resignation in person until the Morning of May 26, 1971, and alleged that he was given no time to go home and think the matter over. He estimated that the whole transaction, from the time he entered the agency until he signed the resignation form took no more than 45 minutes. (HT pp. 49-52 and 84-89)

When asked on direct examination by his representative why he felt he was coerced into resigning Mr. Gratehouse stated:

"I was coerced in the sense that if I didn't

sign the resignation he was going to deny me the increase, and Mr. McGough said, 'Do it'".

He also testified that he was not advised he could dispute the withholding of the step-increase until he later talked to the union. It was only after this that he sought to withdraw his resignation on September 1, 1974.

Mr. Diamond testified that although he was not Mr. Gratehouse's immediate supervisor, he did give him assignments, and did meet with appellant periodically to discuss his performance. After deciding that appellant's performance did not warrant an in-grade salary increase, he advised Mr. Gratehouse by letter dated March 19, 1971 that it was being indefinitely withheld. He intended to reassess the appellant's performance in June and felt that this was implied in his memorandum. After the letter was issued Mr. Orlebeke "indicated to Mr. Gratehouse that he would be well advised to seek employment elsewhere" and told Mr. Diamond to "See what you can do to help him find another job." Mr. Diamond then solicited positions within HUD for the appellant and gave people with whom he talked positive statements in appellant's behalf. However, when Mr. Doan of FHA called and asked specifically whether appellant had any "negative features or points" he felt obliged to tell Mr. Doan what had transpired. Subsequently Mr. Oberleke and Mr. Ganley were unhappy about what he had done, but felt, given the circumstances, it was the proper thing to do. He was told by Mr. Ganley not to interfere with appellant's seeking other employment again. (HT pp. 92-94, 105, 112-118).

Mr. Diamond stated, in effect, that he did not ask appellant at any time "What are my options?" However, some time within one to three weeks prior to May 26, 1971 he had a discussion with

the appellant, in the presence of Mr. McGough, in which the appellant stated that this was the first "somebody had questioned his performance", that he was thinking of going into politics; that it was a black mark on his record; and that he concluded by saying "I would rather resign than have a withholding of a within-grade on my record." Up until this time, Mr. Diamond was hoping that appellant's performance would improve, and that he was under the impression that Mr. Gratehouse was still seeking employment. He stated that he did not ask appellant to resign. (HT pp. 120-123, 126-127).

Subsequently, while appellant was on sick leave, Mr. Diamond stated that he told Mr. McGough to call Mr. Gratehouse to inquire if "he was still interested in offering to resign as a means of obtaining the within-grade", and to have him come in if he was. Mr. McGough reported back that appellant was "interested in that kind of an arrangement", and the May 26, 1971 meeting resulted. Mr. Diamond did not recall seeing appellant on May 25,1971, but identified that as the date Mr. McGough talked to the appellant on the telephone. (HT pp 95-96, 134) Mr. Diamond recalled that the May 26, 1971 meeting was held in Mr. Ganley's outer office. He, the appellant, Mr. McGough, and Mrs. Cook were present. He testified that there was "some discussion to the effect that Mr. Gratehouse was here to sign a Form 52 indicating a resignation, and I was going to be signing a form calling for a within-grade increase". There was also some discussion of the time the resignation was to be effective "at which point this suggestion was that it run through 90 days, and then Mrs. Cook said the pay period ends---September 4, and therefore that was the effective date". (HT pp. 98-99)

Mr. Diamond testified further that between March 19 and May 26, 1971 appellant began to produce some of the "products" he had requested.

However, he still had doubts about Mr. Gratehouse's performance. He had received some agency materials, and possibly the U.S. Code, concerning "acceptable level of competency", and was particularly impressed "by the phrase that the within-grade had to be merited". He admitted that as a result of the exchange of his approval of appellant's within-grade increase for Mr. Gratehouse's resignation, the appellant had received a within-grade promotion to which he was not entitled by statute. (HT pp. 130, 135-136)

Although Mr. Diamond at first testified that the resignation forms were typed up at the time of the May 26, 1971 meeting (HT p.97), upon being shown that May 20, 1971 date on the resignation form, he agreed this indicated that the form had been typed up in advance of the meeting (HT 132). He stated that the HUD Form 8064, "Competance Certification of Work Performance" , was also prepared in advance, probably by the personnel office. He admitted that the May 20, 1971 date on this latter form was in his handwriting, and that he may have placed that date on the form because he had observed the date May 20, 1971 on the resignation form (HT pp. 132,134 and Appellant's Exhibit #2. at the hearing).

Mr. Diamond was asked on cross examination if he had ever told Mr. Gratehouse "that he had any rights with respect to the determination you had made?" Mr. Diamond's only response was that appellant had contended verbally that his performance warranted the within-grade increase (HT p. 110). Nothing in the record shows that the appellant was ever advised by Mr. Diamond or by anyone else in the agency, of the provisions of part 531, subpart D, of the Civil Service Regulations prior to the acceptance of his resignation. One of the provisions of this subpart is that an agency shall give an

employee an opportunity to secure reconsideration of a determination that his work is not of an acceptable level of competance.

Turning to Mr. McGough's testimony, at the time of these events he was Acting Assistant Director, Office of Economic Analysis, and the appellant's immediate supervisor. He testified that after Mr. Diamond became Director of the Office, the latter gradually took over some of his supervisory functions, including some direct supervision of the appellant. Mr. McGough became aware that Mr. Diamond was increasingly dissatisfied with the appellant's performance because appellant frequently reported for work late, because he did some poor work on analysis, and because he missed deadlines. After the issuance of the March 19, 1971 letter the appellant discussed the contents of the letter with him. He recalled that Mr. Gratehouse was very upset with the letter, and that appellant told him that he could not afford the within-grade denial "because it would not look good on his record". Appellant also mentioned to him that he was going to law school, wanted to get into legal work, and might like to go into politics so he preferred a clean personnel record. However, Mr. McGough did not believe appellant considered resigning in March 1971. (HT pp. 139-142)

Mr. McGough became aware that an agreement was reached that appellant was to seek other employment, and that Mr. Diamond had agreed not to interfere with these efforts. Subsequently, he was called by Mr. Doan of FHA and he gave Mr. Gratehouse as good an evaluation as he could. Mr. Doan called him back later and told him that Mr. Diamond had given appellant a "different evaluation" than he had. Mr. McGough concluded that by so doing, Mr. Diamond had interferred with appellant's seeking a job with FHA . (HT pp. 157-159)

Turning to the meeting between Mr. Diamond and Mr. Gratehouse at which the word "resignation" was first mentioned, Mr. McGough testified that he was not present at this meeting. Prior to that time, although he had heard appellant say he would do almost anything to avoid a black mark on his record, he had never heard Mr. Gratehouse use the word resignation in discussing his situation. After the meeting, however, both the appellant and Mr. Diamond had discussed it with him. Mr. McGough gave somewhat contradictory testimony about what he was told. At one point in the hearing he testified that Mr. Diamond told him that Mr. Gratehouse had offered to resign; and that appellant had told him he would like to avoid resignation, but if it was necessary to keep his record clear he would like to effect some kind of orderly transfer out of the agency (HT pp. 143-144).

At another point, upon cross-examination, he testified that he was told by both parties that resignation was among a number of alternatives discussed, not that Mr. Gratehouse had specifically offered to resign. (HTp. 164)

On Monday, May 24, 1971, shortly after the meeting where resignation was discussed, Mr. Diamond instructed Mr. McGough to call the appellant and to ask him to come in as soon as possible. The gist of the message which he was to deliver to appellant was that Mr. Diamond wanted to resolve the matter because the time for withholding the within-grade increase was coming up; and that, since Mr. Gratehouse said he would prefer to resign rather than have a black mark on his record, Mr. Diamond was willing to take him up on the offer and give him the within-grade increase if he would resign. Mr. McGough delivered this message. The appellant replied that he didn't think that was the best solution for him.McGough stated then he suggested that since Gratehouse had some promising leads for a job, it might be in his best interest to resign if

he wanted to avoid having the within-grade denial on his record; and that a longer period (presumably before the resignation would become effective) might be worked out to give him an opportunity to locate another position. (HT pp. 146-147)

Mr. McGough's recollection of the events which followed differed from that of appellant and Mr Diamond. He stated that Mr. Gratehouse came into his office briefly at noon Tuesday, May 25, 1971. He thought that he and the appellant went into Mr. Diamond's office on that day, and that Mr. Diamond then "made the offer that if Mr. Gratehouse would follow on his offer to resign Mr. Diamond would sign his within-grade increase and give him some time into the summer, July or sometime , to find another job". He also recalled that appellant advised him that since he had called personnel before coming in and had not gotten any response, he was going to the personnel office that day. (HT 148) At a later point in his testimony he testified that the effective date of the resignation was discussed on May 25, 1971, with Mr. Diamond stating he wanted the appellant gone by July 1971, and Mr. Gratehouse responding by requesting more time since if he went in July, he wouldn't have enough time to look for a job (HT pp.171-172).

Mr. McGough testified that Mr. Gratehouse returned to the agency on Wednesday May 26, 1971, and that the final meeting was held in Mr. Ganley's outer office. Before the meeting he suspected that he and the appellant had discussed the resignation, and he thought he had again suggested to the appellant that it would be in his best interests "to accept this kind of compromise". (HT p.169) The'papers'were exchanged at this meeting. Although he did not see the resignation documents, he believed the effective date of the resignation was put in at the last minute. (HT pp. 149-150).

Mrs. Willa Mae Cook testified that in May 1971 she worked for Mr. Orlebeke and Mr. Ganley. She recalled typing in the information shown in the blanks in part III of the SF 50 form by which appellant's resignation was effected. She stated that she did so on instructions from Orlebeke and Mr. Diamond so it would be ready "when Mr. Gratehouse and Mr. Diamond were coming up". She was at first uncertain as to the date on which she typed the information in, but testified subsequently that she was sure that since she put the date May 20, 1971 on the form that was the correct date on which it had been prepared. She was present during the resignation episode and recalled Mr. Diamond saying to Mr. Gratehouse"...if you sign the resignation then I will not withhold your within-grade, something to that effect."

Ms. Deborah DeSault also testified at the hearing. She identified herself as presently being a "Personnel Officer....Chief of the Operations Area in the Headquarters Operation of the Division of Office Personnel", HUD. At the time of the events in question she was responsible for the personnel work in the office in which appellant worked; and was acquainted with him from October 1970 to October 1971. She recalled attending a meeting in September,1971 when the appellant sought to withdraw his resignation. but she could not recall any prior conversation with Mr. Gratehouse concerning the withholding of his within-grade increase. She did testify that she thought it was improper , in the abstract, for a supervisor to give an employee a within-grade increase for which the supervisor felt he did not meet the statutory requirement in return for the employee's resignation. (HT pp. 174-180)

In addition to the testimony of witnesses, the appeal file contains documents bearing on the resignation episode. In an attachment to an

appeal memo dated September 15, 1971, Mr. Gratehouse recited the events which occurred on May 25 and 26, 1971 as follows:

"On the afternoon of Tuesday, May 25th, Mr. McGough called me at home and told me to report the following morning about 11:30 in Diamond's office. He further informed me that Ganley and Diamond had reached an agreement between themselves the nature of which involved a resolution of the in-grade impasses. He indicated it would probable mean a resignation on my part and we could discuss it further the next day.

Following this talk, I immediately called Ganley to get more details and he advised me to take whatever offer Diamond was making me....I then called the Personnel Director's Office and left messages for him to call me but they were never answered.

On Wednesday, McGough, Diamond and myself went to Ganley's office where his secretary handed me a standard resignation form and my in-grade action was given to Diamond. Before signing, Diamond specified he wanted the effective date to be 60 days off. McGough suggested the date be August 1 and asked it be at least another 30 days after that. Diamond reluctantly agreed and set the date at September 3, 1971. At this point, we both signed simultaneously."

In his September 15, 1971 memorandum Mr. Gratehouse made this contradictory statement:

"...the record shows a strong element of intimidation by management. It began first with the notification from complainant's immediate supervisor on May 24 (underscoring supplied) to report the next day...."

Another document in the record is a letter dated November 2, 1971 from Mr. E.C. Williams Director, Technical Personnel Services Division, HUD

to the Chief, AEO, in response to Mr. Gratehouse's appeal. At one point the Director stated:...When a resignation of July 26 was suggested, Mr. Gratehouse on May 25 proposed an August 1 date and on May 26, he proposed that the effective date be moved forward to September 1. The Administrative Officer for the Deputy Under Secretary thereupon suggested September 4, the end of a pay period." His letter does not state the source of this information.

From Mr. McGough's demeanor at the hearing, from the fact that his interest in the resignation matter is less personal than that of the appellant and Mr. Diamond, and from the fact that he no longer is under Mr. Diamond's supervision and not subject to the latter's control, we find it more reasonable to believe Mr. McGough's testimony where it is in conflict with that of Mr. Diamond and Mr. Gratehouse. With this in mind, as well as from all of the evidence of record, including that discussed above, we find the facts in this case to be those set forth below.

From the time he became Acting Director of the Office of Economic Analysis in October 1970 until March 1971 Mr. Diamond became progressively dissatisfied with Mr. Gratehouse's performance and his habit of reporting late for work. Consequently, on March 19, 1971 he issued a notice to appellant informing him of several areas in which his performance had been poor, and notifying him that the within-grade salary increase due him in June 1971 was being indefinitely withheld. The notice was unequivocal, for it neither stated nor implied that this decision was subject to change if appellant's performance improved. In fact, it ended by hinting that appellant's performance was so poor that he might be removed. Although Mr. Diamond testified that he hoped appellant's performance would

improve, with the implication that as a result his decision might change, his subsequent actions belie this. What we do find is that Mr. Diamond, who admittedly had some knowledge of the Commission's regulations regarding the withholding of within-grade increases, preferred not to process the withholding action if that could be avoided. We find it reasonable to believe that he was aware that had he done so, he would have had to advise Mr. Gratehouse that the latter could request reconsideration of his decision. Consequently, he took an active part in an agreement to assist the appellant in a search for other employment, and was hopeful that appellant would leave before the withholding action would have to be effected. When he was asked for a recommendation for the appellant for a position which might have resulted in Mr. Gratehouse's promotion, he quite properly felt that he had to advise the official making the inquiry of his reservations concerning appellant's performance. It turned out that by so doing, however, he prevented the result he was hoping for-i.e., the appellant's leaving the Office of Economic Analysis.

Mr. Gratehouse, on the other hand, was very concerned about the effect the withholding of his within-grade increase might have on his future career, either as an Economist in Government or in the legal field or politics once he completed law school. Both parties had their respective problems in mind when approximately a week before the resignation was effected Mr. Diamond took the initiative in again discussing the within-grade increase denial with the appellant. At this meeting the appellant admitted that he first brought up the subject of resignation. The record is inconclusive, however, as to whether the "exchange" of the within-grade increase approval for appellant's resignation was specifically discussed at this time. Mr. Diamond says it was, and Mr. Gratehouse says it was not. Mr.

McGough gave two conflicting versions of what was told to him by the parties after the meeting. That Mr. Diamond intended to obtain the appellant's resignation after this meeting is clear, however, for he and/or Mr. Orlebeke had a resignation form typed up on May 20, 1971. Additionally, he had Mr. McGough call the appellant while the latter was on sick leave in order to have the appellant come in to consummate what he described to Mr. McGough as an agreement initiated by the appellant.

Mr. Gratehouse has continually insisted that he had no knowledge of the exchange agreement until the meeting on May 26, 1971. We find this contradicted by Mr. McGough's testimony concerning the telephone conversation which was held on May 24, 1971, not on May 25, 1971 as stated by Mr. Diamond and the appellant. Additionally, we find that the appellant discussed the matter personally with Mr. Diamond on May 25, 1971 as testified to by Mr. McGough. Finally, appellant admitted asking Ms. DeSault about the propriety of the exchange before it took place. By his own recitation of events this could not have occurred on May 26, 1971. We find that it probable took place on May 25, 1971, when he advised Mr. McGough he was going to the personnel office. Our conclusions in this regard are also supported in the record by Mr. Gratehouse's reference to a telephone call from Mr. McGough on May 24, 1971 in his September 15, 1971 memo of appeal; and by Mr. William's reference to a meeting on May 25, 1971 in his November 2, 1971 letter to the Commission.

On May 26, 1971 the exchange took place in Mr. Ganley's outer office. The previously prepared resignation form was signed by the appellant, after the effective date was added, and Mr. Diamond signed the form granting him his within-grade salary increase. Here, again, however, the record shows that Mr. Diamond took the lead in effecting the transaction.

IV. CONCLUSION

From our analysis above, we find that Mr. Gratehouse had at least from May 24, 1971 until May 26, 1971, a period of two days, to decide what action he should take with respect to the "exchange". Appellant was well educated, was attending law school, and was a relatively high grade federal employee. Mr. McGough testified that appellant twice sought his advice on what course of action to follow. Consequently, we find from these facts that Mr. Gratehouse had a reasonable time in which to make his choice.

Appellant sought a longer period of time than was suggested by the agency before his resignation was to be effected. The agency acceded to his request. Consequently, we find that Mr. Gratehouse was permitted to set the effective date of his resignation.

On the other hand, Mr. Diamond pressed the appellant to make a decision for he had Mr. McGough call him while he was on sick leave to have him come in and make it. Additionally, two agency employees upon whom appellant relied, Mr. McGough and Mr. Ganley both suggested that he accept Mr. Diamond's "offer". We find from these facts that the agency did exert some pressure on the appellant to accept the exchange.

More importantly, we find that the agency had a duty to give the appellant all of the information to which he was reasonably entitled before he made his election to resign. However, it did not do this, since it did not advise him that he could request reconsideration of Mr. Diamond's decision to withhold his within-grade increase; and that, if he did so, the decision might be overturned. This fact of itself might easily have influenced Mr. Gratehouse to remain on the agency's rolls and "fight" the withholding decision.

Consequently, we find that the agency deceived Mr. Gratehouse by withholding this information from him.

The gravest fault we find with the entire exchange transaction, however, is that no matter who suggested it, or what the appellant desired, the agency had no authority to effect it. Section 5335, title 5, U.S. Code provides that an employee may not be advanced to the next higher rate in a grade unless his work is at an acceptable level of competance. Mr. Diamond believed that Mr. Gratehouse was not working at an acceptable level of competence, and he had, therefore, a statutory duty to take action to withhold the within-grade increase. Instead, he improperly granted it in order to induce the appellant's resignation.

We conclude, therefore, that Mr. Gratehouse was induced and deceived into resigning, and that his resignation was involuntary. Before the agency could involuntarily remove him from its rolls, it was required to follow the adverse action procedures part 752-B of the Civil Service regulations in effecting the action. These include, but are not limited to, the following: 30 full days advance written notice stating any and all reasons specifically and in detail for the proposed action; an opportunity to reply to the proposal notice both personally and in writing; and the issuance of a written decision stating which of the reasons in the proposal notice were found to be sustained. We find, therefore, that the agency failed to comply with the mandatory procedural requirements of section 752-202 of the Civil Service regulations in separating the appellant.

V. DECISION

We recommend that the agency cancel the September 4, 1971 personnel action separating the appellant by resignation. Please furnish this office with

a copy of the personnel action form accomplishing the recommended corrective action.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

U. S. Civil Service Commission
Appeals Review Board
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted with the 15 calendar day time limitation.

Attached is CSC Form 942 providing more detailed information about further appeals to the Civil Service Commission's Appeals Review Board.

Arthur J. Burgess
Assistant Appeals Officer

Michael E. Sedmak
Chief Appeals Officer

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD

Washington, D.C. 20415

D E C I S I O N

In the Matter of	)	
	)	TYPE CASE:
	)	INVOLUNTARY
DONALD R. GRATEHOUSE	)	RESIGNATION

BEFORE: McDonald, Tillman and Stanislav, Board Members.

INTRODUCTION

This is an appeal from the October 6, 1975 decision of the Commission's Federal Employee Appeals Authority (FEAA), Washington Field Office, which determined that appellee's resignation effective September 4, 1971, from the position of Economist, GS-110-13, Step 4, $19,537 per annum, with the Department of Housing and Urban Development (HUD), Washington, D.C., was involuntary.

STATEMENT OF THE CASE

On May 26, 1971, agency officials reached a compromise with appellee whereby he would resign from his position effective September 4, 1971, and the agency would grant him his within-grade (hereinafter referred to as WGI), due in June 1971. On September 1, 1971, appellee notified the agency that it was his belief that his resignation was the product of illicit actions, faulty contractual grounds, and that the exchange of personnel actions on May 26, 1971, was founded on bad faith. He further requested that his resignation be returned.

The agency processed his resignation and thereby separated appellee from the rolls, effective September 4, 1971.

On September 15, 1971, the appellee appealed to the Commission's Appeals Examining Office (now Washington Field Office, FEAA) alleging that his resignation, effective September 4, 1971, was a product of coercion and constituted an involuntary discharge and that he had requested the withdrawal of his resignation on September 1, 1971, which was denied by the agency.

In its decision of November 4, 1971, the Appeals Examining Office (AEO) found that the agency did not give appellee a valid reason for denying his request for the withdrawal of his resignation and as a result that appellee's resignation was effectively withdrawn on September 2, 1971. It therefore found that the agency's action in separating appellee on September 4, 1971, was an adverse action subject to the provisions of part 752 of the Civil Service regulations and accordingly recommended that the agency restore the appellee to his former position. That decision made no finding on the appellee's allegation of coercion.

The agency appealed the AEO decision to the Board of Appeals and Review (now Appeals Review Board). In its decision dated May 5, 1972, the Board reversed AEO, finding that the agency had shown a valid reason for denying the appellee's request for withdrawal of the resignation and also withdrew AEO's recommendation for corrective action.

By decision decided March 19, 1975, No. 328-73, the United States Court of Claims, remanded appellee's case to the Commission for a hearing. The Board, pursuant to the order of the Court, rescinded the decision of AEO and remanded the case to that office for a hearing to determine whether appellee's resignation from the agency had been voluntary.

FIELD OFFICE DECISION #2

In complying with the instruction set forth in the Board's letter of remand, the Field Office conducted a hearing on June 13, 1975. In its decision dated October 6, 1975, the Field Office found that based on the evidence: (1) the resignation was involuntary because appellee was induced into resigning and the resignation had been obtained under circumstances which were deceptive in nature, and (2) it was therefore an adverse action which had not been effected in accordance with the procedural requirements of subpart B, part 752 of the Civil Service regulations. The Field Office recommended that the agency cancel the September 4, 1971 personnel action separating the appellee by resignation.

REPRESENTATIONS TO THE BOARD

On appeal to the Board, the agency contends that it had no duty to advise the appellee of the consequences of the proposal since the appellee initiated it. It also contends that the supervisor's action in not withholding the appellee's WGI was part of a compromise, one that the appellee desired, and was done in exchange for the appellee's resignation. It further contends that since appellee was the moving party in the compromise, who requested the WGI be approved, appellee should not benefit from the Field Office's finding that the agency improperly granted the WGI.

Through his representative, the appellee submitted his rebuttal to the agency's representations on December 3, 1975.

ANALYSIS AND FINDINGS

With respect to appellee's rebuttal to the agency's representations received by the Board on December 3,

1975, specifically, pages 4,5 and 6 of the brief, concerning the Board's authority, the Board notes that a recent reorganization of the Commission's appellate system eliminated an administrative right of appeal to the Appeals Review Board in all cases where an action appealed was effected on or after September 9, 1974. In those cases, as reflected in the current regulations, a request for reopening and reconsideration by the Board must meet one of the three listed criteria as outlined in the brief on pages 4 and 5. However, in cases involving an action effected prior to September 9, 1974, an appeal is processed to completion under the regulations existing at the time the action was effected. Since appellee's resignation was effected on September 4, 1971, the Board has second appellate level authority in his case as the regulations in effect on September 4, 1971, are applicable to the case.

The Civil Service Commission does not have appellate authority to review a resignation which is effected by an employee of his own volition. The general principle is that a resignation is voluntary if the employee understands the transaction, is free to choose, and is given a reasonable time to make his choice. With this in mind, the Board has reviewed the facts and the representations submitted to the Board by the parties to the appeal.

The voluntary or involuntary character of a personnel action is determined not by the form of the action, but by the circumstances which produced it. In this case, the Field Office found that the agency secured appellee's resignation by inducement and deception and it was therefore an involuntary action. The Board, after reviewing the evidence of record, agrees with the Field Office concerning the facts surrounding appellee's resignation but disagrees with its conclusions.

The record shows that by letter dated March 19, 1971, appellee was informed that his performance had been "less than satisfactory"; that he was being advised that his WGI scheduled for June 1971 was being indefinitely withheld and that his work performance was not of a quality to merit continued employment. After discussions with agency officials, it was agreed that appellee would look for a job outside the Office of Economic Analysis. From the record, the Board finds that appellee was faced with what was, for him, an apparently difficult choice - whether to resign, attempt to seek employment elsewhere, or remain in his position and face the apparent denial of his WGI and possible removal action.

The crux of the Field Office finding that appellee's resignation was induced and that the agency deceived him into resigning, is based on the agency's granting of appellee's WGI in exchange for his resignation, which the Field Office found violated agency and Civil Service regulations. The Field Office finding was also based on the agency's failure to properly advise the appellee of his rights before he made his election to resign, specifically, his appeal rights in connection with the denial of his WGI.

The evidence of record shows that all the tests of a voluntary action have been shown. The facts disclose that appellee was given the freedom of choice and initiated the resignation action. The appellee also had ample opportunity to weigh the matter before resigning. The record shows that he had from May 24, 1971 to May 26, 1971, a period of two days to decide what action he should take with respect to the "exchange". However, the record also clearly shows that from March 19, 1971, the date of the letter notifying appellee of his poor performance and withholding of his WGI, to May 26, 1971, the date of the exchange transaction, appellee was attempting to avoid the denial of his

WGI by seeking employment within the agency or with another agency. He also discussed his predicament with several persons in the supervisory chain. In addition, the Board notes the denial of his WGI and possible removal noted in the letter of March 19, 1971, was a prospective action and cannot stand as a decision.

With this in mind, the Field Office found that under Section 5335, Title 5, U.S.Code, the agency violated the Civil Service regulations and had no authority to effect the appellee's WGI in exchange for appellee's resignation. However, the record shows that the granting of the WGI followed rather than preceeded the discussions and the decision to resign. Moreover, because the March 19, 1971 letter concerning the denial of the WGI was a prospective action and not a decision, there was no requirement that the agency comply with Section 5335, Title 5, U.S. Code, or furnish the appellee his rights, if he wanted to contest the possible denial. Indeed, the reason there was no decision to deny the WGI was because the appellee sought to avoid even an initial denial by his attempts to seek employment with another agency or within his agency, and with the agreement of his agency, engineered his resignation to be effective months later. Based on the foregoing, the Board does not agree with the Field Office that the facts disclose that appellee was induced and/or deceived into resigning. He clearly knew what he was doing and understood the results and was the moving party. The agency simply acquiesced. The Board finds that appellee initiated the resignation and got what he bargained for in exchange - - a clear record, his WGI, no action with respect to removal for cause, and, continuation on the agency rolls for three months while he searched for other employment. The agency did not deceive nor default.

With regard to the Field Office finding that Mr. Arnold H. Diamond had a statutory duty to take

action to withhold appellee's WGI, the Board finds no basis for such a determination. That issue is not for adjudication here. Mr. Diamond had the authority to and did sign (and appellee did benefit from) the required certification resulting in appellee's WGI being granted. Even assuming that the certification was improper, it would not cancel a valid resignation. Deceptive coercion could only follow from a subsequent attempt to void the certification which resulted in the WGI being granted.

In view of the above, the Board finds that the appellee voluntarily resigned, free of any action on the part of the agency to secure the resignation by inducement or deception.

DECISION

The Appeals Review Board hereby reverses the decision of the Washington Field Office decided on October 6, 1975.

As provided by the Civil Service regulations, the decision of the Board is final and there is no further right of administrative appeal.

For the Board:

HERMAN D. STAIMAN
Chairman

March 18, 1976

IN THE UNITED STATES COURT OF CLAIMS

No. 328-73

DONALD R. GRATEHOUSE

v.

THE UNITED STATES

Ben Paul Noble, attorney of record,for Plaintiff, Noble and Larsen, of counsel.

Frank H. Clabaugh, with whom as Assistant Attorney General Rex E. Lee, for Defendant.

Before COWEN, Chief Judge, NICHOLS and BENNETT, Judges.

O R D E R

This case is before the court on plaintiff's motion and defendant's cross-motion for summary judgment. It was previously the subject of an opinion by the court. Gratehouse v. United States, 206 Ct. Cl.288, 512 F.2d 1104 (1975). That opinion remanded the case to the Civil Service Commission (the Commission) for a hearing on plaintiff's charge that his resignation was induced by defendant's coercion and deceit. Plaintiff, who was employed prior to September 4, 1971, as an Economist, GS-13, Step 4, in the Department of Housing and Urban Development (HUD), resigned his

position effective as of that date. He alleges that he did so through the deceit and coercion of HUD management, that this made his resignation involuntary and, in effect, an adverse action, and that he was denied the procedural protections afforded to those subject to adverse actions. He further says that he was granted a within-grade increase (WGI) in consideration of his resignation but such an exchange was contrary to law, thus voiding his resignation. He seeks back pay and reinstatement to his position.

On October 6, 1975, the Federal Employee Appeals Authority (FEAA) of the Commission, pursuant to the order of remand and following a hearing, entered a decision in plaintiff's favor. On March 18, 1976, the Appeals Review Board (ARB) of the Commission, reversed the FEAA decision, concluding that plaintiff was not entitled to recover. The issue now before the court on the pending motions is whether the ARB decision is supportable by substantial evidence and correct as a matter of law. Boyle v. United States, 207 Ct. Cl. 27, 515 F.2d 1397 (1975).

The parties are agreed on the facts as found by FEAA and adopted by the ARB, which disagreed only as to the conclusions to be drawn from those facts. It is clear from these facts that defendant regarded plaintiff as less than a satisfactory employee and proposed to withhold a within-grade increase from him. He was so advised. Concerned that this would be a damaging mark on his personnel record, and in order to forestall the action, plaintiff submitted his resignation in writing under date of May 20, 1971, effective September 4, 1971, in exchange for simultaneous approval of a WGI for plaintiff. The post-dating of the resignation by plaintiff was to give him time to seek other employment.

On September 1, 1971, plaintiff requested

return of his resignation on the grounds of defendant's alleged "illicit actions" and "bad faith". The request was not granted, but plaintiff was offered a 60-day temporary appointment in order to give him still more time to find another position. Plaintiff rejected the offer and appealed his separation unsuccessfully through civil service procedures. Additional historical details are outlined in our 1975 opinion. We were concerned at that time that the Commission had not evaluated plaintiff's claim of coercion and entitlement to adverse action procedures, hence the remand order which has now been complied with.

The real thrust of plaintiff's claim is that he was tricked into signing his resignation in order to get his step increase and that this was illegal. It certainly would be illegal, and his resignation void, if he was so deceived, but the evidence is the contrary. It is absolutely clear from the findings and opinions of FEAA and ARB that the suggestion that plaintiff resign was plaintiff's own idea. The ARB finding sums it up as follows:

> The Board finds that appellee initiated the resignation and got what he bargained for in exchange -- a clear record, his WGI, no action with respect to removal for cause, and, continuation on the agency's rolls for three months while he searched for other employment. The agency did not deceive nor default.

Whether a resignation is voluntary or involuntary is determined, not by the form of the action or terminology used, but rather by the true substance of the action, and by the circumstances that produced it. Patterson v. United States, 193 Ct. Cl. 750, 436 F. 2d 438 (1971); Federal Personnel Manual Supp. 752-1, Subch. S1-2. Here plaintiff had freedom of choice and ample time within which to decide what action to take with respect to

resignation in exchange for the WGI, which exchange he initiated and understood. Plaintiff set the effective date of his resignation. In light of these facts, this transaction did not amount to an adverse action, so no occasion arose requiring provision of applicable procedural rights. Christie v. United States, 207 Ct. Cl. 333, 518 F. 2d 584 (1975); 5 C.F.R.§§752.201 et seq. (1971). HUD, moreover, committed no legal error in failing to advise plaintiff of his right to seek reconsideration of its judgment that his work was not of an acceptable level of competence, entailing the proposed denial of his WGI. See 5 U.S.C. §5335 (1970); 5 C.F.R.§ 531.407 (1971). Such notice of appeal rights need only be given an employee at some time before the end of his "waiting period," the amount of time that must lapse between the granting of WGI's. 5 C.F.R. § 531.407(c)(3) (1971). Plaintiff had submitted his resignation well before the expiration of his waiting period, presenting HUD with no need or opportunity to give him notice.

ARB dismissed the charge that the approval of plaintiff's WGI by supervisors who thought that he did not merit it was illegal and invalidated the resignation that plaintiff submitted in exchange saying that even if the WGI should not have been granted as a part of the compromise package to obtain plaintiff's resignation, nevertheless it could not void an otherwise valid resignation. The validity of plaintiff's resignation depends upon its voluntariness, and again, that is determined from the circumstances surrounding it, not by mere forms and technicalities. Plaintiff initiated and controlled the resignation process, and received in exchange exactly what he bargained for. Plaintiff is estopped from challenging the validity of his resignation on this ground, having accepted the benefits of his own suggestion that he resign, which was agreed to and relied upon by defendant. Peters v United States, 208 Ct. Cl.373,

534 F. 2d 232 (1975); Steueur v United States, 207 Ct. Cl. 282 (1975); Weir v. United States, 200 Ct. Cl. 501, 511, 474 F. 2d 617, 622, cert. denied, 414 U.S. 1066 (1973). The ARB decision is sustained.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment be and it is denied. Defendant's cross-motion for summary judgment is granted. The Petition is dismissed.

BY THE COURT

FEB 4 1977

Wilson Cowen
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 328-73

DONALD R. GRATEHOUSE

v.

THE UNITED STATES

Before NICHOLS, Judge, Presiding, COWEN, Senior Judge, and BENNETT, Judge.

ORDER

This case comes before the court on plaintiff's motion, filed March 21, 1977, for rehearing, or, in the alternative, for rehearing en banc, pursuant to Rules 7(d) and 151(b). Upon consideration thereof, without oral argument, by the six active Judges of the court as to the suggestion for rehearing en banc under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing, filed March 21, 1977, be and the same is denied.

BY THE COURT

APR 29 1977

Philip Nichols, Jr.
Judge, presiding

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SUPREME COURT OF THE UNITED STATES

No. A-97

DONALD R. GRATEHOUSE

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of Petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 27, 1977.

/s/William J. Brennan,Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 29
day of July, 1977